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April 20, 2005

Representative Cathy McMorris  
Chairwoman  
Task Force on Improving NEPA  
Committee on Resources

**RE: NEPA/MEPA – A MONTANA PERSPECTIVE**

Dear Representative McMorris:

Thank you for the invitation to address the Task Force on Improving NEPA regarding my experiences with the National and State Environmental Policy Acts. I hope that these brief comments will prove useful. It's important to note that while I have represented many clients and their associations regarding environmental issues, these comments are my own and should not be attributed to any other person or organization.

Environmental Review Goals

- Opportunity for public involvement
- Understand the potential impact of the action

Perceived Implementation Issues

- Never ending study
  - Increased cost
  - Delays
    - Short Montana construction season
  - Agencies have no clear stopping point
- Inappropriate issues
  - Sewer extension – road impacts
  - Road construction – water quality impacts

- Road construction – land use issues
- Inappropriate level of review
  - EIS not warranted for non-regulatory impacts

### Montana's Response

- Increased due process protection. (See Attachment 1.)
  - Project alternatives proposed by the agency must be reasonable, technologically achievable, and economically feasible.
  - Agency must consult with project sponsor regarding alternatives identification.
  - Sponsor may request a review of the agency's alternatives identification before the appropriate board.
  - Agency director must endorse any findings of significance.
  - Sponsor may request a review of the agency's findings of significance before the appropriate board.
  - Clear time limit, and time limit extension process, for review completion.
  - Sponsor may request a review of the agency's time limit extensions before the appropriate board.
  - Agency must conduct a meaningful "no-action" alternative review, looking at all impacts of the project's non-completion.
  - Agency must consider regulatory impacts on private property.
  - Sponsor may appear before the EQC or agency director to discuss the review process issues.
  - In any challenge to an agency's MEPA decision, the burden of proof is on the challenger to show that the review was inadequate.
  - Court may not consider evidence not submitted to the agency during the review process and must remand back to the agency for consideration.
  - Court may only set aside MEPA decision with clear and convincing evidence that the decision was arbitrary or not in compliance with the law.
- Clarification between substantive and procedural agency authority, i.e., the agency may not withhold, deny, or impose conditions on any permit or other authority to act based on MEPA.
- EIS trigger, i.e., the agency must make a written determination, based on material evidence identified in the determination, that there will be a significant environmental impact or a potential for a significant environmental impact.

### Next Steps

- Get the agencies out of the “weighing game”, e.g. no significance determinations.
- Ensure compliance with MEPA goals of “public involvement” and “hard look” through other means: web sites, regulatory statutes, etc.

Thank you again for the opportunity to appear before the Task Force and I appreciate your attention to these important matters.

Sincerely,

/s/

Michael S. Kakuk  
Attorney